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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN RE: THE MARRIAGE OF:

CYNTHIA MILLER,

Appellant-Petitioner,

vs.

MARK D. BOUSMAN,

Appellee-Respondent.

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No. 48A02-0704-CV-291

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APPEAL FROM THE MADISON SUPERIOR COURT  
The Honorable Dennis D. Carroll, Judge  
Cause No. 48D01-9306-DR-471

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**April 11, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

## Case Summary and Issue

Cynthia Miller appeals the trial court's order granting Mark Bousman, Miller's ex-husband, relief from judgment. On appeal, Miller raises three issues, which we consolidate and restate as whether the trial court properly granted Bousman relief from judgment. We reverse and remand, concluding the trial court improperly granted Bousman relief from judgment.

## Facts and Procedural History

On June 23, 1993, Miller filed a petition for dissolution of marriage, having been married to Bousman for over twenty-six years. On March 5, 1996, the trial court entered a decree that dissolved the parties' marriage and disposed of the marital estate. The decree disposed of Bousman's General Motors pension plan (the "Plan") as follows: "Husband shall receive one-half and wife shall receive one-half of the General Motors pension. A Qualified Domestic Order shall issue forthwith awarding one-half (1/2) of the pension (as of 6/23/93) to the wife." Appellant's Appendix at 28. On August 25, 1999, Bousman filed a qualified domestic relations order (the "Original QDRO") with the Plan administrator that included the following relevant provisions:

a. . . . [Bousman] and [Miller] shall each be awarded an interest in the Plan. [Miller] is entitled to 50% of [Bousman's] benefits accrued between 11/20/66 and 6/23/93.

b. . . . Benefits to [Miller] will commence on the date [Bousman] retires from General Motos [sic].

. . .

e. . . . [Miller] is entitled to a share of any early retirement supplement, interim supplement or temporary benefit. [Miller's] share of said benefit is proportional to [her] interest in [Bousman's] total accrued benefit.

Id. at 31-32. Bousman retired in early October 1999, and he and Miller began receiving monthly benefits pursuant to the Original QDRO. On April 17, 2001, Bousman filed another qualified domestic relations order (the “Amended QDRO”) with the Plan administrator.<sup>1</sup> The Amended QDRO contained the same provisions as the Original QDRO, except that it rescinded Miller’s right to receive an early retirement supplement, interim supplement, or temporary benefit (the “Supplemental Benefits”); this rescission resulted in a reduction of approximately \$550 in monthly benefits to Miller.

On July 13, 2004, Miller filed a motion to vacate the Amended QDRO and reinstate the Original QDRO. On September 23, 2004, the trial court entered an order granting Miller’s motion. In its order, the trial court stated the Amended QDRO “was not entered pursuant to pleading or request” and it “specifically finds that the [Original QDRO] reflects the Courts [sic] original intent as to division of [Bousman’s] General Motors Hourly Employee Pension Benefit.” Appellant’s App. at 42. The trial court also ordered the Plan

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<sup>1</sup> Miller points out that Bousman did not receive the trial court’s permission to file the Amended QDRO with the Plan administrator, and Bousman does not appear to challenge this assertion. The record is somewhat conflicting on this point, but Miller’s position is consistent with the trial court’s subsequent finding that the Amended QDRO “was not entered pursuant to pleading or request.” Id. at 42. Although the Amended QDRO does contain the commissioner’s signature and the trial court’s stamped signature, it does not appear in the chronological case summary. Moreover, during a hearing on May 22, 2006, the trial court recalled the confusion the Amended QDRO created when it was brought to the trial court’s attention:

[I]t was quite the extraordinary thing and [Bousman’s counsel] was in a very awkward situation attempting to explain how it was possible that an amended qualified domestic relations order made its way to General Motors without any sort of petition having been filed. . . . And so we were scratching our heads and [Bousman’s counsel] was here, at least at one of those hearings, and it was rather awkward trying to understand how it’s possible without a petition, without an order in the Court order book or Court file, that this could have happened. I don’t think we ever got a satisfactory answer to that question.

Transcript at 7-8.

administrator to pay Miller the Supplemental Benefits that were denied to her while the Amended QDRO was in effect. On November 11, 2004, the trial court denied Bousman's motion to correct error. On December 2, 2004, Bousman filed a notice of appeal, but moved to dismiss his appeal on March 28, 2005. This court granted Bousman's motion on April 5, 2005, dismissing his appeal with prejudice.

On April 4, 2006, following several unsuccessful attempts to receive reimbursement through the Plan administrator, Miller filed a motion requesting, among other things, that the trial court enter judgment against Bousman for \$22,624.25, which is the amount Miller claimed was wrongfully paid to Bousman while the Amended QDRO was in effect, award her reasonable attorney fees, and award her "additional damages for the time and effort she has put in with General Motors in an effort to fix this problem . . . ." Id. at 61. On May 22, 2006, Bousman filed a motion for relief from judgment pursuant to subparagraphs (6) and (8) of Indiana Trial Rule 60(B), arguing he was entitled to relief because the original decree was void and because the trial court's reinstatement of the Original QDRO resulted in the distribution of assets that were not marital property, namely, the Supplemental Benefits.

On March 2, 2007, the trial court entered an order denying Miller's motion and granting Bousman's, finding that the Original QDRO "is contrary to law because it improperly divides Mark's early retirement benefit, interim supplement and temporary benefit, which were neither explicitly included in the Decree of Dissolution nor vested at the time the Decree of Dissolution was issued." Id. at 21. The trial court also ordered that the parties schedule a hearing "to determine what monies, if any, are owed to Mark as

reimbursement for the months the [Original QDRO] was in effect.” Id. Miller now appeals this order.

### Discussion and Decision

#### I. Propriety of Trial Court’s Decision

Miller argues the trial court improperly granted Bousman relief from judgment. A trial court’s decision to grant a party relief from judgment is equitable in nature, and this court will not reverse unless there has been an abuse of discretion.<sup>2</sup> Crafton v. Gibson, 752 N.E.2d 78, 82-83 (Ind. Ct. App. 2001). Abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. Id. at 83.

Trial Rule 60(B) states in relevant part:

On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment . . . for the following reasons:

...

(6) the judgment is void;

...

(8) any reason justifying relief from the operation of judgment . . . .

The motion shall be filed within a reasonable time for reasons . . . (6) . . . and (8) . . . . A movant filing a motion for reason[] . . . (8) must allege a meritorious claim or defense. . . .

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<sup>2</sup> Miller argues we should apply a de novo standard of review, citing this court’s observation in Hotmix & Bituminous Equip., Inc. v. Hardrock Equip. Corp., 719 N.E.2d 824, 826 (Ind. Ct. App. 1999), that “the standard of review for the granting of a motion for relief from judgment made pursuant to Trial Rule 60(B)(6), alleging that the judgment is void, requires no discretion on the part of the trial court because either the judgment is void or it is valid.” Although a de novo standard may apply where the trial court granted relief pursuant to Trial Rule 60(B)(6), that standard appears to be limited to cases where the judgment was void for lack of subject matter jurisdiction. See Santiago v. Kilmer, 605 N.E.2d 237, 239 (Ind. Ct. App. 1992), trans. denied; see also Mills v. Coil, 647 N.E.2d 679, 680 (Ind. Ct. App. 1995) (applying an abuse of discretion standard and distinguishing Santiago on the grounds that the judgment in that case was void for lack of subject matter jurisdiction), trans. denied. Because Bousman does not argue the judgment was void for lack of subject matter jurisdiction, we will apply an abuse of discretion standard.

Because the trial court stated in its order that Bousman was entitled to relief “[p]ursuant to Trial Rule 60(B)(6) and (8),” appellant’s app. at 21, we will examine the propriety of the trial court’s decision under both of these provisions.

#### A. Trial Rule 60(B)(6)

Miller argues the trial court improperly granted relief under Trial Rule 60(B)(6) because the dissolution decree was not void on its face. Bousman counters that the dissolution decree was void because it improperly included the Supplemental Benefits as marital property.

Bousman’s argument overlooks that relief under Trial Rule 60(B)(6) is limited to cases where the trial court lacked jurisdiction. See Gourley v. L.Y., 657 N.E.2d 448, 449 (Ind. Ct. App. 1995), trans. denied. We rejected an argument similar to Bousman’s in Dusenberry v. Dusenberry, 625 N.E.2d 458, 461-62 (Ind. Ct. App. 1993), in which the wife argued the dissolution decree was void because it improperly included a personal injury settlement as marital property. We concluded relief was not available under Trial Rule 60(B)(6) because the wife’s argument was not “jurisdictional,” but a claim “that the Decree was erroneous, as a matter of law . . . .” Id. at 462. Like the wife in Dusenberry, Bousman does not challenge the trial court’s jurisdiction, but claims it improperly included the Supplemental Benefits as marital property. Thus, it follows the trial court abused its discretion to the extent it granted Bousman relief under Trial Rule 60(B)(6).

## B. Trial Rule 60(B)(8)

Miller also argues the trial court improperly granted Bousman relief from judgment under Trial Rule 60(B)(8). In addition to requirements that the party must file a motion within a reasonable time and allege a meritorious claim or defense to receive relief under Trial Rule 60(B)(8), this court has stated consistently that Trial Rule 60(B) cannot be used as a substitute for a direct appeal or to revive an expired attempt to appeal. See Ind. Ins. Co. v. Ins. Co. of N. Amer., 734 N.E.2d 276, 279 (Ind. Ct. App. 2000), trans. denied; Cullison v. Medley, 619 N.E.2d 937, 945 (Ind. Ct. App. 1993), trans. denied; see also William F. Harvey, 4 Indiana Practice 222 (3d ed. 2003) (“The general rule is that one must appeal a judgment within the time allowed and not sit idly by, letting the time to appeal expire, and thereafter filing a Rule 60(B) motion in an attempt to revive his remedy of appeal. . . . Relief is only properly provided under Rule 60(B) after a failure to perfect an appeal when there is some additional fact present justifying extraordinary relief which allows a trial court to invoke its equitable powers to do justice.” (emphasis in original)).

Our decision in Snider v. Gaddis, 413 N.E.2d 322 (Ind. Ct. App. 1980), illustrates this principle. The plaintiffs in Snider brought an ejectment action against the defendants. The trial court entered judgment in favor of the defendants, declaring them to be fee simple owners of the property in dispute. Over a year later, however, the trial court granted the plaintiffs relief from judgment, declaring instead that they were the fee simple owners. On appeal, we noted that the plaintiffs’ motion for relief from judgment did not raise any new argument, and therefore characterized the trial judge’s decision to grant relief as one where he “simply reconsidered the trial record, changed his mind, and corrected his judgment.” Id.

at 327. Although such a decision would have been proper if the plaintiffs' motion was a motion to correct error, we noted it was "clearly improper" in the context of Trial Rule 60(B) and concluded the trial court abused its discretion in granting the plaintiffs relief.

The facts in this case are substantially similar to those in Snider. After the trial court granted Miller's motion to vacate the Amended QDRO and reinstate the Original QDRO, Bousman filed a motion to correct error arguing that "the trial court improperly found that the Respondent Husband's early retirement benefit was marital property . . . ." Appellant's App. at 48. When the trial court denied Bousman's motion to correct error, he initiated an appeal, but ultimately had it dismissed with prejudice.

Over a year later, Bousman filed a motion for relief from judgment. Bousman did not, however, support his motion with new argument or otherwise claim that changed circumstances justified relief. Cf. Beike v. Beike, 805 N.E.2d 1265, 1270 (Ind. Ct. App. 2004) (concluding the trial court properly relieved husband from judgment by permitting him to file an amended QDRO that reduced wife's monthly benefits where husband demonstrated that his pension benefits had been unexpectedly reduced due to employer's bankruptcy). To the contrary, Bousman used the same argument that he used to support his motion to correct error. See Appellant's App. at 64 (Bousman's motion for relief from judgment stating that "the Qualified Domestic Relations Order currently in effect is contrary to law because it improperly divides Respondent-Husband's early retirement benefits, which were neither included in the Decree of Dissolution nor vested at the time the Decree of Dissolution was issued"). Consistent with Snider, we interpret Bousman's motion for relief from judgment as an attempt revive his remedy of appeal. Because the trial court cannot grant a party relief



from judgment under such circumstances, it follows the trial court abused its discretion when it granted Bousman relief under Trial Rule 60(B)(8).

## II. Procedure on Remand

We briefly address two issues that are likely to arise on remand. First, because we reverse the trial court's decision to grant Bousman relief from judgment, it follows that the trial court's decision to conduct a hearing to determine what amount of money, if any, Bousman is entitled to as relief is moot. Second, the trial court's decision to grant Bousman relief from judgment required that it also deny Miller relief from judgment. As Bousman correctly points out, however, although Miller states in her motion that she seeks relief from judgment, the motion in fact requests that the trial court enforce its September 23, 2004, order. Because we remand with instructions to the trial court to reinstate this order, we conclude that Miller's motion is before the trial court on remand. If the trial court so chooses, it may conduct a hearing and receive evidence before ruling on the motion.

## Conclusion

The trial court abused its discretion when it granted Bousman relief from judgment. Accordingly, we reverse and remand with instructions for the trial court to reinstate its September 23, 2004, order and for further proceedings consistent with this opinion.

Reversed and remanded.

MATHIAS, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

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Appellant-Petitioner,	)	
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vs.	)	No. 48A02-0704-CV-291
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	)	
Appellee-Respondent.	)	

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**FRIEDLANDER, Judge, dissenting**

I believe the trial court was correct in granting relief under Trial Rule 60(B)(8) and therefore respectfully dissent from the decision to reverse that judgment.

A T.R. 60(B) motion is addressed to the equitable discretion of the trial court. *Brimhall v. Brewster*, 864 N.E.2d 1148 (Ind. Ct. App. 2007), *trans. denied*. T.R. 60(B) is an omnibus provision that confers broad equitable power to the trial court in the exercise of this discretion and imposes a time limit based only on reasonableness. *Id.* Everyone seems to agree that the original QDRO was contrary to law in that it improperly divided Bousman's early retirement, interim supplemental, and temporary benefits, which were not vested at the time the decree of dissolution was issued. Bousman filed an amended QDRO on April 17, 2001 QDRO, some twenty months after the parties had been begun receiving benefits under the flawed, original QDRO. Miller did not challenge that amended QDRO for more than

three years, whereupon the parties commenced legal proceedings to resolve the dispute. Ultimately, the trial court granted Bousman's May 22, 2006 motion for relief from judgment and entered an order essentially correcting the original mistake.

On these facts, and focusing especially on Miller's failure to challenge Bousman's amended QDRO for more than three years, I believe Bousman's motion for relief from judgment was filed within a reasonable time under T.R. 60(B)(8) and is sustainable under that rule. I would affirm the judgment.